Volume 10 | Issue 1

1-1906

The Forum - Volume 10, Issue 4

THE FORUM.

VOL. X. JANUARY, 1906. NO. 4

Subscription, $1.25 per annum, payable in advance.

PREPONDERANCE OF EVIDENCE, AND REASONABLE DOUBT.

Different standards of weight of evidence are imaginable. If the evidence is testimonial the number of witnesses for or against can be counted. Two witnesses swearing to the same fact are stronger than one of them alone. If the evidence is circumstantial, six circumstances equally persuasive of the *factum probandum*, are stronger than three of them. The number of the *media* of persuasion is a measure of their persuasiveness.

In the Anglo-American system of jurisprudence, the law seldom prescribes any particular number of pieces of evidence. Two witnesses are required by statute, to establish a will. By constitution, two witnesses must prove the same overt act, in prosecutions for treason. One accused of perjury can generally be convicted only on the testimony of two witnesses to the untruth of the oath which is alleged to have been perjured, or, on that of one, corroborated by facts proven by another.. Equities of various sorts, are susceptible of being established, to the disadvantage of those having what is called the "legal title," only by the testimony of two witnesses, or of one, fortified by circumstances proven by another.

But, besides difference in respect to the number of the media of proof, there is a difference in respect to the intrinsic persuasiveness of the same number of *media*. There are two witnesses. A is mature, observant, careful, free from proneness to exaggeration, truth-

ful. B is young, immature and untruthful. The statement of A wins a larger credit than that of B. If the evidence is circumstantial, one circumstance may more cogently than another, persuade of the primary fact.

In all cases, the so-called burden of proof of some fact rests on one of the parties. He must furnish some evidence. That evidence must be relevant, *i. e.*, it must tend to convince of the *factum probandum*, rather than of other facts. It must also have some cogency, higher than the lowest. If the Judge who presides at the trial thinks that it does not possess this degree of cogency, he must refuse to submit the question to the jury. He must think that reasonable men might on the evidence believe the fact, to establish which the evidence was tendered; otherwise he must refuse to let the jury return a verdict for the party on whom is the burden of proof. If the evidence as much tends to prove some other than the fact at issue, as the fact at issue, (*e. g.*, that a notice to an endorser of the dishonor of a note, was of the dishonor of note X as that it was of note Y) the Court must decline to submit it[1].

But let us suppose that the party having the burden has furnished evidence that is enough, in the opinion of the judge, to warrant a jury's belief of the fact. The opposite party then furnishes evidence of a contrary tenor. The two bodies of evidence have been addressed to the same minds, and must be considered and compared by them. If they leave these minds in a state of equilibrium, if these minds are unable to say which of the bodies of evidence is the more persuasive; or if they are able to say that they are equally persuasive, the decision must be against the party who has the so-called burden of proof.[2]

Suppose, however, the evidence is appreciably stronger on one side than on the other. Either, alone, might convince, but neither, contradicted by the other, may be sufficient to convince. Two apparently credible persons testify affirmatively. One, somewhat more credible, testifies negatively. The testimony of the two, or of the one, would have been believed, had it not been contradicted by that of the one or of the two. It is clear that the evidence may leave the jury unconvinced, as to which of the assertions, the affirmative or the negative, is true, although it is conscious that the testimony of the two is somewhat stronger than that of the one, or *vice versa*. Opposing pieces of evidence may leave doubt, although one piece is stronger than the other, and doubt is not belief. Doubt "means,"

[1] National Bank v. National Bank. 114 Pa. 1.
[2] Continental Ins. Co. v. Delpeuch, 82 Pa. 225.

says Sully,[1] "a pulling of the mind in two directions, that is, a state of discord or conflict due to the action of two incompatible and antagonistic thought tendencies (forces of association.) In this case, it is evident, judgment is altogether arrested, or suspended. It is this state of doubt or uncertainty, and not that of disbelief, which is the proper psychological opposite of belief. In belief the mind is at rest, the impulse to inquire is satisfied, and the volitional activity involved in thought is quieted. In doubt, on the other hand, we are in a state of unrest, conflict, or baffled activity."

The text-books and authorities usually inform us that in civil cases, the decision must be, according to the "preponderance of evidence." The persuasion necessary, in such cases, says Wigmore,[2] is "said to be that state of mind in which there is felt to be a preponderance of evidence, in favor of the demandant's proposition." "The doctrine that a reasonable doubt of guilt is to work an acquittal, does not apply in civil issues," says Trunkey, J.,[3] "in these, the result should follow the preponderance of evidence, even though the result imputes a crime." "In civil issues," says Wharton,[4] when there are conflicting hypotheses, the judgment must be for that for which there is a preponderance of proof."

A corollary from this rule would be that the juror or the judge must in many cases decide in favor of A or B, the parties to the suit, that a fact did or did not occur, although he does not believe that it occurred or did not occur. A sues B on a note, whose execution B denies. Six witnesses affirm that the signature is in B's handwriting. Five affirm that it is not. No difference in competence, or trustworthiness, between these witnesses appears. Six however are more than five. The ordinary man, juror or judge, would say that the evidence "preponderated" in favor of A's proposition. But would the ordinary discreet man believe that proposition? Instead of six let us suppose twenty witnesses, and instead of five, let us suppose nineteen. Still there is a preponderance towards A's contention. But would a sensible man necessarily believe that B signed the note, when nineteen men each equally credible with each of the twenty, said that he did not sign it? In such a state of the evidence, the prudent and careful man would remain in

[1] The Human Mind, Vol. 1, p. 457. Whately's Rhetoric, p. 103.
[2] Evidence. 3545.
[3] Mutual Fire Ins. Co. v. Usaw. 112 Pa. 80.
[4] Evidence 30. By proof. the author means evidence, presumptions of law or fact and citations of law: *Id.*. p. 2. Best says that the "mere preponderance of probability is decisive in civil cases." Evidence P. 85. But not everything for which *some* evidence can be adduced. is *probable*; nor every thing. for which the affirmative evidence is *appreciably* stronger than the negative evidence.

a state of doubt. He would say there is one-nineteenth more evidence in favor of B's having signed, than in favor of his not having signed, but I am not convinced that he signed it. I neither believe nor disbelieve that he signed it.

If the rule quoted is to be adopted, it follows that a verdict in a civil case need not, and therefore does not, express the belief, opinion, or conviction of the jury as to the existence or non-existence of the facts which form the issue, but simply as to the existence of the preponderance of the evidence, a totally different matter. There can be evidence that fact X occurred, when it did not occur, and evidence that fact X did not occur, when it did occur, and, for the same reason, there can be more evidence that it occurred than that it did not occur, although it in fact did not occur, and to believe that there is this greater degree of evidence of occurrence than of non-occurrence, is not to believe the occurrence, rather than the non-occurrence.

The rule indicated results in palpable absurdity. The object of the law is, or ought to be, to secure the sequence of certain results upon certain objective facts. If B signed the note he ought to be compelled to pay it. It would be, of course, inadmissible to hold that the absolute certainty of the jury that he signed it, should be the preliminary to this compulsion. But would it be too much to hold that the jury should believe, at least in some low degree, that he signed it? Is not the principle abhorrent that B may be coerced into paying a sum of money to A, when thejury does not believe. even in a faint degree, that he promised to pay it, simply because it believes that, of the plaintiff's and defendant's respective pieces of evidence, that of the former is heavier than that of the latter?

What those who have laid down the principle that "preponderasce" of evidence will justify and require a decision conformable with it, have failed to realize, is that perception of the preponderance of evidence is quite consistent with want of belief. Of two pieces of very weak evidence, one may preponderate. It might be barely enough to convince, had it not encountered the contradictory evidence. Opposed by the latter, it may be insufficient to generate even the lowest degree of belief. To detect a preponderance of evidence that B signed a note, is neither to believe that he signed it, nor to be logically required to believe that he signed it. It would be fatuous to affirm that a man ought to believe even faintly, every thing the evidence for which is, in his opinion, stronger than the evidence against it.

Sometimes, by some authorities, a distinction is taken between

different sorts of civil cases; in some, the rule of preponderance of evidence being laid down, and in others that of belief. Thus Starkie, J.,[1] says: "But in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale. * * * * But, even where the contest is as to civil rights only, a mere preponderance of evidence, such as would induce a jury to incline to the one rather than the other, is frequently insufficient. It would be so in all cases when it fell short of fully disproving a legal right once admitted or established or of rebutting a presumption of law." He says that "full proof" of a devise, or of a revocation of an earlier will, must be made. "One who seeks to charge another with a debt, must do so by full and satisfactory proof;" and one who alleges payment of debt must furnish "full proof."

In a considerable number of cases the Courts of this state require not a preponderance of evidence, but a satisfaction, a convincing of the judge or jury, not that evidence of a fact preponderates over evidence against it, but that the fact exists. An equitable title to land resting in parol can prevail against the legal title, only when the evidence of it is "clear, satisfactory in character and *convincing*."[2] The evidence to reform a writing on account of mistake or to set it aside for fraud must be satisfactory. When the allegations in a bill in equity are denied by the answer, the proof must be clear, precise and indubitable. These cases hold that a preponderance of evidence, however great, is sufficient to sustain the burden of proof. The evidence must not only preponderate but it must convince.

That it were illogical to allow juries in ordinary cases to find for a party on whom is the burden of proof, when the evidence does not convince them even in a feeble degree, of the fact averred by the party, but in certain other cases to require convincement and even a considerable degree of it, is palpable, and occasionally the courts, without realizing their inconsistency, require conviction in other cases. An example is Howell v. Mellon,[5] where the question being whether certain legatees of the proceeds of a sale of land, whose conversion was directed by the will, had elected to take the land in stead of its proceeds, Dean, J., remarks, "All that was necessary

[1] Evidence. p. 817.
[2] Hess v. Callender. 120 Pa. 138; Williams v. Milligan, 183 Pa. 386.
[3] 6 P. & L. Dig., Col. 10277;
[4] Honesdale Glass Co. v. Storms, 125 Pa. 268.
[5] 189 Pa. 169.

was that the weight of the evidence should produce *conviction of the existence of the fact.*" . . . . . .

There is no measure of the weight of evidence (unless the witnesses or the evidential facts are counted,) other than the feeling of probability which it generates. If X hearing A aver a certain fact, and B deny it, believes the fact, or disbelieves it, he, in so doing appraises the evidence of A as heavier, or lighter than that of B. For him, for it to be heavier is for it to produce faith in him. The rule in all civil cases ought to be that the jury should find against the party who has the burden, unless it is persuaded, believes, is convinced, that the facts which he has averred have occurred; unless it has passed from a neutral state of doubt into belief. The belief may be of different degrees, and while the possible degrees are innumerable, and cannot be individuated and labeled, there are still some differences which can be vaguely distinguished from each other. A man may barely believe; he may believe strongly, he may be certain. It is not my purpose to investigate the wisdom of requiring some facts to be more strongly proved than others. It would be difficult, I suspect, to justify the doctrine that, if A sued B for the malicious killing of her husband C, A would not need to do more than furnish a preponderance of evidence of the killing and the malice,[1] but, if X alleged that a deed was elicited from him by fraud, or that a stipulation intended to be put in it, was omitted by mistake, only such preponderance of evidence as generated a satisfaction; as made the fraud or mistake seem "indubitable," would avail. The distinction cannot be justified by the suggestion that the party alleging the fraud or mistake was in some way reprehensible for it, for it is made in cases in which reprehension of him would be pharisaical.

In criminal cases as in the special civil cases adverted to, the courts formed the habit of advising jurors not simply to be conscious of a preponderance of evidence of guilt, nor to believe the guilt, but to have a "clear impression" of it, to be "satisfied" of it, before returning a verdict of guilty.[2] At length, the admonition was given that they should have no "rational doubt;" they should be convinced beyond a "reasonable doubt." "In all criminal cases whatsoever," says Starkie, "it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither a mere preponderance of evidence nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt."

[1] Fire Ins. Co. v. Usaw, 112 Pa. 80;
[2] Wigmore, Evidence, 3542.

In Drum v. Commonwealth,[1] Agnew, J., instructed the jury in a homicide case that they should "give the prisoner the benefit of any reasonable doubt, arising out of the evidence, which prevents them from coming to a satisfactory conclusion. But this doubt must fairly arise out of the evidence, and not be merely fancied or conjured up. A jury must not raise a mere fanciful or ingenious doubt to escape the consequences of an unpleasant verdict. It must be an honest doubt—such a difficulty as fairly strikes a conscientious mind and clouds the judgment. If the mind be fairly satisfied of a fact on the evidence—as much so as would induce a man of reasonable firmness and judgment to take the fact as true, and to act upon it in a matter of importance to himself, it would be sufficient to rest a verdict upon it." In an earlier murder case,[2] Gibson, C. J., told the jury, "You have been told that to doubt of the prisoner's guilt is to acquit her. But a doubt, to work an acquittal, must be serious and substantial—not the mere possibility of a doubt. If the evidence convince you of guilt beyond a reasonable doubt, you are bound to convict. You are the judges of its effect; and if you cannot reconcile it to any reasonable hypothesis of innocence, you may acquit; if not, you are bound to say so."

Two important psychological elements appear in these statements: they are belief and doubt; Doubt as we have seen is the negation of belief. The question for A is did X strike Y? He neither believes nor disbelieves, he is in doubt. To advise A to believe beyond a doubt, is to advise him simply to believe and possibly to believe hard. So long as he believes, he does not doubt. His belief may be feeble, it may not have terminated meditation, and it may vanish on the calling up into distinct consciousness of the contradictory evidence, or on the more critical examination of the evidence which has evoked the belief. If the admonition to the jury means that the belief of guilt should be strong and not weak, tenacious and pertinacious, despite repeated reflection on and analysis of the evidence, and despite the realization of the gravity of a verdict of guilty, it is intelligible. But the phraseology employed is scarcely to be commended for perspicuousness. What is a "reasonable doubt?" The advice is directed to the juror. He must have the doubt and he must be the critic of it. He is to say whether it is reasonable. But what man ever entertained a doubt, which at the time. he believed to be unreasonable? To be convinced that a doubt of a fact is unreasonable, is to believe the fact. To tell a man that

[1] 58 Pa. 9.
[2] Com. v. Harman, 4 Pa. 269.

if he believes beyond a reasonable doubt, he must do so and so, is to tell him that if he believes beyond reasonably not believing, he is to do so and so, a valuable instruction surely!

The doubt is to arise out of the evidence, Why so? Before the juror has heard a syllable of the evidence, he doubts, he is instructed to doubt, the guilt of the accused. He is told in odd phrase that innocence is to be presumed. Suppose that initial doubt persists, despite the evidence. Will it arise *out* of the evidence? Must the juror say guilty, because his still present doubt is a mere continuation of the doubt with which he began?

Is it true that the doubt must arise out of the evidence? A man experienced with nature and with men, brings in his consciousness to the trial, a store of knowledges, which are tests of the credibility, the probability of the testimony of witnesses, or of the inferences to be drawn from circumstances. The doubt lingering in his mind, after the evidence has been concluded, may be produced by the application of these subjective criteria to it. Is such a doubt illegitimate?

The doubt must not be fancied or conjured up, but must arise out of the evidence. To fancy a man is to form a mental picture of him, to imagine him. Are we to understand that to fancy a doubt is to do the same thing for the doubt, as is done for the man? A fancied doubt, is a doubt which does not exist, but which is pictured. imagined. To tell the juror not to indulge in a fancied doubt, is to tell him not to form pictures of doubt, and let these pictures of doubt, these unreal doubts, limit, bound, qualify, real belief of the guilt of the prisoner. A sapient instruction surely!

A conjured up doubt! What is that? Is it a doubt? If it is, like all other facts, pyschological or physical, it has causes. What kind of causation is it, that these magical words "conjured up" are designed to indicate? Perhaps they are explained by the following words: raise. A juror must not raise, etc. He must not raise a fanciful doubt. Does this mean, form in his mind an image of doubt, imagine a doubt? He must not raise an ingenious doubt? Why not? What is the objection to the ingenuity of the doubt? Some ingenious cross-examinations have been invaluable, in the eliciting of truth. We cannot see *a priori*, why doubts should be condemned because they are ingenious. Is the palm to be given to dull, common-place, stupid doubts? Is the doubt that visits only the rarely sagacious, experienced and acute mind to be condemned, because it does not frequent also minds of another class? An ingenious doubt may be often a very sensible one.

But the doubt must not be "raised" for a particular purpose, viz., to escape the consequences of an unpleasant verdict; that is, apparently the juror must not dishonestly refuse to consider all the evidence, with the sole purpose of ascertaining the facts; he must not allow his contemplation to be warped by a desire to avoid, for whatever reason a verdict of guilty. Considered as a direction to the jury to weigh the evidence dispassionately, without bias, and without desire to reach a verdict of not guilty, the only objection to it is, that it does not embrace the caution against trying to reach a verdict of guilty.

The doubt must be an "honest doubt." Doubt is a state of non-belief. The honesty in view, is probably, not so much a property of the doubt, as of the mind that has it. The dishonest doubt is the doubt which results from the dishonest mental manipulation of the evidence; dwelling on some, ignoring or slighting others, with a view, not to reach the fact, but to reach a pre-determined verdict.

The doubt we are told is such a difficulty as fairly strikes the conscientious mind and clouds the judgment. A truly remarkable doubt, indeed! It is now, not a doubt, but a difficulty. A difficulty is an obstacle of some sort, to the reaching of an end, a desired end, or an end whether desired or not. But this is a difficulty which does two weird things, it strikes, and it clouds. It strikes a mind, and not a bad mind, be it noted, but a conscientious mind. The juror must have a conscientious mind, and then it must be struck by a difficulty, and if this difficulty is a doubt, the doubt will be honest, and the juror need not find the prisoner guilty. The difficulty also must cloud the judgment. The judgment seems to be conceived as a landscape and the difficulty causes clouds to hang over it; or it is conceived as an eye, or a spy-glass, and vision is rendered obscure by clouds before it.

If the juror's mind is fairly satisfied of a fact on the evidence, so far convinced, that a conviction of an equal degree of strength, would induce the juror to take action in matters of importance to himself he would be justified in returning a verdict of guilty. This is a totally different criterion. There may be a satisfaction based on the evidence, that the defendant is guilty. This satisfastion may be so strong that an equally strong satisfaction would be acted upon by the juror in a matter of importance to himself. This criterion is extremely vague. There are many degrees of importance, and many kinds of matter of importance. But, how few of them ought to be regarded as of equal importance with the act by which a fellow man is stigmatizes as a criminal, and deprived of his property, his liberty, or his life?

Instruction of the sort under review if obeyed, would lead to the performance of some singular mental operations. The juror must imagine some important affairs of his own. He must conceive that they would be affected in some way by the guilt of the accused, and he must discover that, in the hypothetical condition, he would take an important resolution if he believed the guilt of the accused as strongly as he now actually believes it. He must do more. He must imagine himself—as, of course, all jurors do.—to be a man of reasonable firmness and judgment. With this reasonable and usual self-esteem, and with an imagination for his affairs, and a vaticinal vision of what his volition would be, in the imagined conjunctures, he is in a situation to sit as critic upon his belief and say whether he ought to incorporate it into a verdict.

What has been said suffices to suggest the uselessness of such instructions as are found in the phrases of Justice Agnew.

C. J. Gibson tells the jury that they must convict if the evidence convinces beyond a reasonable doubt. Conviction and doubt are two inconsistent states of mind. If the jury is convinced, it does not doubt, reasonably or unreasonably; if it doubts it is not convinced,. Possibly what is meant is, if the conviction or persuasion gives signs of firmness, of not lapsing into doubt on further reflection, or more critical sifting of the evidence, the verdict must be guilty. How long the critical process of rumination must last, a day, an hour, fifteen minutes, we do not know. The jury must, from the strength of their opinion, guess that it would resist the onset of argument and criticism of the evidence, and thus guess that it is beyond reasonable doubt. Perhaps what is meant is that the jury must believe the guilt of the accused and must further believe that no man, hearing the same evidence, and fitly considering it, would doubt. In either case, the jurors are invited to speculate as to the persistence of their own opinion, or as to the opinions of other minds, related as theirs are to the same evidence.

A statement of Chief Justice Shaw of Massachusetts has been not infrequently quoted by Judges.[1] The jury is to render a verdict of guilty, if it believes the defendant guilty beyond a reasonable doubt. And this is the explanation of a reasonable doubt It is "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of jurors in tha condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.* * * * The evidence must establish the truth of the fact to a reasonable and moral cer

[1] It is quoted in Com. v. Devine, 18 Superior, 431.

tainty,—certainty that convinces and directs the understanding and satisfies the reason and judgment. * * * This we take to be proof beyond a reasonable doubt!"

The doubt is a state of the case! I had imagined that it was a state of the mind. The state of the case, viz., the state of the evidence in the case, leaves the jurors' minds in a condition: What condition? This, viz., that they cannot say, that they have a conviction. I suppose that, if they cannot say that they have a conviction, it is because they have not the conviction. What conviction? It is an abiding conviction. But, what is that? One that has abode, for a considerable time, or one that is going to abide? How long before rendering the verdict must the conviction expressed by it have been formed? A week, a day, an hour, five minutes? If the abidingness is future, by what faculty does the juror know that it is going to abide? By what quality of the conviction does he recognize its longevity? By its strength? By its defiance of past argument in the jury-room? Who knows? But, it is a conviction to a moral certainty. Is the certainty a different state of mind from the conviction, or is the phrase used to mean, a conviction which is a certainty, that is, a very strong conviction? It would be hypercritical to challenge the usage which speaks of a moral certainty, but it is impossible to see how an ordinary juror is to be aided by being told that if he is morally certain of the prisoner's guilt, he is to convict him.

Chief Justice Shaw then substantially informs us that a reasonable doubt is the absence of an abiding moral certainty, That is, all shades of belief below certainty are doubt! We had supposed that doubt was the absence of belief. It seems now, in Shaw'spsychology, that doubt is the absence only of a high belief; a reasonable doubt is the absence of capacity of the mind to say that it has an abiding conviction which is a certainty; that is, is the absence of an abiding conviction which is a certainty. A remarkable revelation surely!

In order to convict, we are further told, the evidence must produce a moral certainty of the guilt. But this certainty has some very peculiar powers. It convinces, and it directs the understanding, it satisfies the reason and judgment. Certainty is the state of being convinced, but, in Shaw's philosophy, it is the cause of, and therefore different from, the conviction. A moment ago, there was "an abiding conviction *to* a moral certainty" but now it is a certainty generating a conviction! This certainty, which is not a state, but an actor, a cause, has seemingly, three subjects on which

to operate. There is an understanding; there are a reason and a judgment! Or are these three names only for one thing? But, that cannot be, for the operations are different. The certainty convinces and directs the understanding. It does no such thing for the reason or the judgment. Its function is, respecting these, humbler shall we say, or more exalted? It "satisfies" the reason and judgment! A certainty satisfies! The certainty that one has fallen heir to a million dollars "satisfies" but it does not satisfy the reason: only the cupidity, the desire for happiness; The certainty that X. the defendant killed Y, satisfies the reason! What is this strange elusive thing called satisfaction of the reason? And what singular thing is reason, that it should be satisfied by a certainty that the defendant has committed an atrocious crime? Perhaps what is satisfied is the desire to find out who committed it, that is, the official curiosity of the jurors for which "reason and judgment" are odd names.

Doing the best possible with Chief Justice Shaw's phrases, all that can be got out of them is this: Before convicting of a crime a juror should be morally certain, that he committed it, and this conviction should be the result of a serious consideration of all the evidence.

Prof. Wigmore well says, in his noble work on Evidence,[1] "When anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is mere confusion, or, at least, a continued incomprehension."

[1] Vol. 4. p. 3543.

WILLIAM TRICKETT.

MOOT COURT

WM. STALEY vs. JEROME JACOBS.

Contracts—Specific Performance—Tender—Bona Fide Purchaser—When Time is of the Essence.

STATEMENT OF THE CASE.

John Jacobs agreed in writing to convey a farm to Staley, who agreed therein to pay $2500 for it on April 1st, 1905.

The writing also stipulated that if Staley should not pay at that time, the agreement was to be void.

Despite this agreement, John Jacobs conveyed the farm to Jerome Jacobs; on March 1st, 1905.

Staley omitted to tender the money to John or Jerome until April 2nd, when he tendered it to both, demanding a deed.

They refused to receive it or make the deed.

This is a bill for specific performance of the contract.

Barner for the complainant.

A contract for the sale of real property raises an implied trust in favor of the vendee which will be enforced against subsequent purchasers with notice of the prior contract of sale. Tiedeman on Real Property, Sec. 498; Baum vs. Dubois, 43 Pa. 260; Hamory vs. Sargent, 25 Pa. C. C. R. 191.

Showalter for the respondent.

Specific performance will not be decreed in favor of a party who has slept on his rights. Due diligence is necessary to call the court into action and where it does not exist, a court of equity will not lend its assistance. Parrish v. Koons, 1 Parsons 79; Dohnert's Appeal, 64 Pa. 31; Oxford vs. Thomas, et al., 160 Pa. 80.

Time is essential if the contract is to be void, if the fulfilment is not within the prescribed time. Reed vs. Breedon, 61 Pa. 460; Barnard vs. Lee, 97 Mass. 92.

OPINION OF THE COURT.

BRADDOCK, J.—This is a bill for specific performance by Staley against Jerome Jacobs, who is the vendee of John Jacobs, the last named being the man with whom Staley had a writing purporting to convey a farm to him for the sum of $2500.

The agreement was to be void if money was not paid on April 1st, 1905. John Jacobs conveyed to Jerome Jacobs on March 1, 1905. Staley tendered April 2nd. Tender refused by both. We are of the opinion this bill should be dismissed for the following reasons, viz:

1. Bill does not allege that Jerome Jacobs was not a bona fide purchaser, if he was a bona fide purchaser he took land stripped of the equities with which it was burdened while in John Jacobs' hands. If he was not a bona fide purchaser specific performance may be had in Pennsylvania. Riel v. Gannon, 161 Pa. 289; Coolbaugh v. Ransberry, 23 Super Ct. 97.

But proof must be had that purchaser knows of contract for sale of land in controversy.

2 The complainant Staley did not tender money until day after April 1, 1905, the day upon which agreement was to expire, therefore, he is guilty of laches. Granted that time is not of the essence of contracts when land is in question, yet in Reed vs. Breeden, 61 Penna. 460, an agreement was made for sale of land, part of hand money to be paid on delivery of deed; deed was executed, vendee paying part of hand money, deed then left with an attorney with agreement that if remainder of hand money was not paid at an appointed time all negotiations should end. Held, time was essence of contract.

Here we have an agreement specifying April 1, 1905 as the day upon which money should be tendered and no other day. It does not matter surely whether a deed was placed in hands of an attorney or not.

3. No relationship of vendee to vendor is shown, this fact might tend to show fraud but is not set forth.

John Jacobs put it out of his power to convey before April 1, 1905. But that fact alone does not give Staley action for specific performance against Jerome Jacobs. Let the complainant seek his remedy at law.

5. When evidence is uncertain no decree can be entered. Fussell v. Rhodes, 2 Phila. 165.

And now, it is decreed by the Court that this Bill be dismissed with the costs placed on the complainant.

OPINION OF THE SUPREME COURT.

The agreement was that Staley should pay the price of the land, $2500, on April 1st, 1905, and that if he did not pay at that time, the agreement should be void. Ordinarily, time is not treated as of the essence of the contract, to use an oft recurring but vague phrase. But the parties may directly show by their language, that they intend to make it of the essence, and no words could more clearly express this interest, than those employed by the plaintiff and the defendant.

It is no more the inclination of the chancellor than of the common law judge, to deny the contractual power of persons *sui juris* except in a few fairly well defined circumstances. Staley agreed that he should have no right to a conveyance, and on the other hand should be discharged from the duty to pay the $2500, if he did not tender the money before or on April 1st, 1905. This was one of the considerations for Jacobs' undertaking at all, to make the conveyance. Their contract must be respected. 19 P. & L. Dig. Dec. 32805; Vito v. Birkel, 209 Pa. 206.

The tender was made on April 2nd, one day too late. Lateness by one day, as much avoids the contract, as lateness by a thousand days. At the close of the first day of April, the contract had, according to its terms, become void; the obligation of it had ceased. Then could tender, later, effect

a revivification of it? In Penna. Mining Co. v. Martin, 210 Pa. 49, it was said that an option to buy land within nine months from June 17th, 1899, would be terminated, by the lapse of March 17th, 1900, without the exercise of it.

Jacobs conveyed the land to Jerome a month before the expiration of the time within which Staley's contract required him to tender the money. This he had a right to do, provided that he gave notice to Jerome of his contract with Staley. Jerome would then take the land subject to Staley's right. But Staley's right would not be enlarged. It would be his duty to make the tender before or on April 1st, if he desired to receive a conveyance.

If Jerome was not apprised of Staley's contract, his estate, acquired by the conveyance, was discharged from Staley's equity. Specific performance would now be impossible.

Appeal dismissed.

JOHN CURZON, ADM'R. vs. JAS. LEITER.

Warrant of Attorney to Confess Judgment—Presumption of Payment On a Bond—Evidence.

STATEMENT OF THE CASE.

Leiter gave to his father in 1880 for money borrowed, a bond for $2000, payable in 1881, with warrant of attorney to confess judgment. The bond has on it endorsements that interest for each year to 1890 have been paid. These were written by the father, who died in 1901, when the bond was more than 20 years due. The father's will devised that the bond be deducted from the share of Jas. Leiter in his estate. His estate is only $500, except the bond. The widow claims against the will. A petition is filed by Curzon, Adm'r., for leave to enter judgment on the confession. The defendant in his answer alleges that he paid the interest to 1890 and that in 1891 he paid the principal. He offers to show that he was fully able to pay from 1890 on; that his father was in failing circumstances, often borrowing money from other parties.

Flanagan for the petitioner.

The evidence was inadmissible under clause e, Sect. 5, of Act of May 23, 1887.

Laub for the respondent.

Indorsements upon a sealed instrument, or bond, of payments on account, or of interest paid, signed by the obligee are insufficient to rebut the presumption of payment, unless they are proved affirmatively to have been made before the presumption of payment had ripened; and this though they are dated prior to the expiration of that period. Cremer's Est. 5 W. & S. 331; Last v. VonNeida, 109 Pa. 207; Rummer's Appeal,

121 Pa. 648; Hart v. Beecher, 182 Pa. 604; Hart v. Beecher, 186 Pa. 384. Where evidence has been given tending to rebut the presumption of payment, evidence tending to strengthen the presumption is admissible. Van Loon v. Smith, 103 Pa. 238; Huges v. Hughes, 54 Pa. 240; Devereux's Estate, 184 Pa. 433.

OPINION OF THE COURT.

McALEE, J.—This is a petition filed by John Curzon, administrator of Jas. Leiter, deceased, for leave to enter judgment on a bond with warrant of attorney to confess judgment attached.

In 1880, the defendant Leiter, gave to his father for money borrowed, a bond for $2000 payable in 1881, with warrant of attorney to confess judgment. The bond had on it endorsements that interest for each year up to 1890 had been paid. These were written by the father who died in 1901, when the bond was then more than 20 years due. The father's will devised that the bond be deducted from the share of James Leiter in his estate. His estate was only $500 except the bond. The widow claimed against the will. Hence this petition by the administrator to enter judgment on the confession.

The defence resists the entry of the judgment on two grounds: first that the debt was paid by the defendant to his father in 1891; second that more than twenty years have elapsed since the bond became due.

To support the first proposition that the debt was paid by the defendant to his father in 1891, the evidence is very meagre. The defense produces no witnesses who saw the bill paid. No receipt was put in evidence. The mere allegation of the defendant is not sufficient to establish the fact of payment of the money to his father as under clause (e) of the act of 1887, he is precluded. The defendant clearly has failed to establish the fact of the payment of the bond in 1891.

The legal presumption of payment arising from the lapse of twenty years in the case of a specialty or bond does nothing more than shift the burden of proof. Devereux's Estate 184 Pa. 429. Within twenty years the law presumes that the debt has remained unpaid, and throws the burden of proof upon the debtor. After twenty years the creditor is bound to show, by something more than his bond, that his debt has not been paid, and this he may do, because the presumption raises only a *prima facie* case against him. The presumption therefore is not conclusive. However each case must be decided on its own peculiar facts. If nothing had been done to the bond since 1880, then clearly the burden of proof would be upon the administrator to prove the fact of non-payment and under the facts of the case the petition would be dismissed. But the presumption of payment from lapse of time may be rebutted by any facts which go to destroy that presumption. This presumption is extinguished by an intermediate acknowledgment of the obligor that the debt or debt is still due and unpaid or by part payment of the principal or the payment of interest within twenty years or by the commencement of legal proceedings. Gregory v. Comm., 131 Pa. 611. The defendant admits in his answer that he paid the interest on the bond up to the year 1890. It is laid down in Gregory v. Comm., supra, that all debts unrecognized for twenty years, in the absence of sufficient explanation, are presumed to have been paid. Clearly this payment of the interest on the bond is such a recognition of the debt up to 1890 as to rebut the presumption

of payment and put the burden of proof upon the defendant to show that the debt has been paid. The presumption would not arise until twenty years after the last payment of interest.

The defendant offers evidence to show that he was fully able to pay the debt from 1890 on; that his father was in failing circumstances, often borrowing money from other parties. This evidence is admissible, having been so held in Hughes v. Hughes, 54 Pa. 240 and Devereux's Estate 184 Pa. 433. But in these cases it was decided that the ability of the obligor to pay and the pressing need of the obligee for money have been recognized as circumstances which aid the presumption of payment." It does not conclusively establish the fact of payment. But as the burden of proof is on the defendant to show that the debt has been paid, the mere fact that the obligor was able to pay and the obligee in need of money would not of itself establish the fact of payment. The relation of the parties—father and son, the father while in need of money, would not press his son for the payment of his bond, even if the obligor had been able to pay. It is not conclusive that because a person has money he will pay his debts. However if an obligor never had any money, it would be strong evidence that he did not pay, but the converse would not be true nor would the evidence be so strong.

Therefore as the defendant has failed to prove that the debt has been paid, to the satisfaction of the court, the petition to enter judgment on the confession is allowed.

OPINION OF THE SUPREME COURT.

This is a petition for leave to enter judgment on the warrant of attorney. The bond has been payable more than twenty years. The rule of court of Cumberland County, p. 42, directs that "when the instrument is above twenty years old, there must be a rule to show cause served on the defendant, if he be found within the county." The rule has been served, and cause has been shown by the defendant why the judgment should not be entered.

The first position assumed by the defendant, is, that the lapse of more than twenty years until the bond became payable, furnishes a presumption than twenty years since the bond became payable, furnishes a presumption question is, has it been rebutted?

There are endorsements of payments of interest, for each year to 1890; They are in the hand-writing of the obligee. Had they clearly appeared to have been written at the dates mentioned in them, they would have been evidence of the payments, for Leiter, the obligee, is now dead, and the making of them would have been against his interest. He died in 1901 and, so far as appears, after the expiration of twenty years from the maturity of the bond. He *may* have made them after that expiration. If he did they tended to promote his interest, for if receivable in evidence, they constituted evidence by which the whole principal of the debt would be made now collectible. As the date mentioned in the endorsement is not receivable as proof that it was the true date of the endorsement, and there is no other indication when it was made, we cannot know that it was against the interest of the obligee, and hence, we. cannot receive it as evidence The presumption of payment stands, despite the endorsements.

It is urged however, that the obligee has, by his will, converted the debt into an advancement. The will directs that the bond be subtracted from the obligor's share of his estate. This is precisely what the law would do, if the bond continued to be a valid debt. A direction in the will to do the same, will not convert a debt into something else. Had the estate been large enough to make James' share equal to the bond, then the retention of that share would pay the bond. The estate, including the bond, is but $2500; of which the widow is entitled to one third, viz., $833.33. There would remain, for James, the only child, but $1666.67.

The widow claims against the will. At the instant of the testator's death, the $2500 was a part of his estate; an enforceable chose in action As an ordinary bequest or devise would be inoperative against a recusant widow, so a testamentary conversion of a debt into an advancement would be. An advancement is a species of gift, and against the widow, the testator can no more dispose of his property, in the form of a debt, by making it an advancement, than by giving it unconditionally. The will has not extinguished the bond.

Is there any evidence to overcome the presumption of payment? The defendant himself admits that he paid interest to 1890, thus corroborating the endorsements on the bond. The principal was then unpaid in 1890, and only fifteen years has run since then.

The defendant in his answer, alieges that he paid the principal in 1891; and he avers his ability to pay, from 1890 on; the failing circumstances of his father, etc. This rule is to be disposed of on petition and answer. The answer does not disclose that the proof of payment in 1891 is to be made only by the defendant himself, a generally incompetent witness, nor if it were would it be manifest that something might not happen which would restore his competency, or that objection to his incompetency might not be waived.

Enough we think is made to appear by the answer of the defendant to require the decision of a jury. For that reason the allowance of the entry of the judgment was erroneous.

Order set aside with *procedendo*.

BOSLER vs. MATTHEWS.

Sale—Fraud—Misrepresentation of Vendee.

STATEMENT OF THE CASE.

Thomas Horn had a voice much resembling that of David Mattnews Bosler is a wholesale wool merchant of high standing. Horn is a man who lived by his wits. Horn telephoned to Bosler asking quotations on wool and

after some conversation, during which he impersonated David Matthews he ordered a thousand pounds of wool sent to No. 10 Broadway, the address of Matthews. Horn was on hand when the wool arrived and told the drayman to put the wool on the pavement. He then went within and sold the wool to David Matthews and departed with the money. Bosler later sent the bill to Matthews who repudiated the idea of a contract with Bosler. Bosler sues for the wool.

Smith for the plaintiff.

Sale of goods by one who tortiously gets them without the owner's consent vests in the purchaser no title to them as against the owner. Barker vs. Dinsmore, 72 Pa. 427.

When a person through false representations as to his identity induces another to sell and deliver goods to him, there is in fact no contract and no title passes; and the goods may be recovered though in the hands of an innocent third party. Pecan vs. Shipper, 35 Pa. 239.

Lewis for the defendant.

OPINION OF THE COURT.

KEENAN, J.:—The result of this case will undoubtedly be a hard one whichever way it may be decided. One of two innocent parties must suffer by the fraud and knavery of a practised swindler, who had no authority to act for either of the parties to this action. Still the case must be fairly and justly decided, and as *precedents* exist, our conclusions must be based on them.

From the undisputed evidence arising in this case a gross fraud has been perpetrated by this man Horn, who representing himself to be Matthews, telephoned to Bosler and ordered one thousand pounds of wool to be sent to Matthews' address, No. 10 Broadway. Horn was on hand when the wool was delivered and told the drayman to put the wool on the sidewalk, which was done and then Horn went within and sold this same wool to Matthews and departed with the money he received. Later Bosler sent a bill to Matthews, who refused to pay, whereupon Bosler brought this suit of replevin to recover the wool.

The main question now to be determined is, on whom shall the loss fall, on the plaintiff or on the defendant? This is a mixed question, composed partly of law which is for the Court to determine and partly of fact, which is for the jury.

The general Pennsylvania rule is as laid down in Barker v. Dinsmore, 72 Pa 427, that no man can be divested of his property without his own consent and voluntary act. Are these qualities here present? We think not. Bosler sold the goods to Matthews, as he thought, and not to this adventurer, Horn, whose voice was similar to that of Matthews, Bosler did not intend to sell this wool to this man Horn as an individual on his own responsibility, but he did intend to hold Matthews responsible. It was Horn's impersonation of Matthews, also the resemblance between the two voices that induced Bosler to sell the goods, which were ordered to be delivered to Matthews' accustomed place of business. This, we judge, was the usual method of transacting such business and nothing is apparent, that would have put the plaintiff on his guard. He knew that Matthews was engaged in the wool business, probably had dealings with him before, so that when the above order was telephoned to him, he had no hesitancy in filling it. What

was he to do to make his position more secure? Was he to visit Matthews and see him face- to face and obtain a verbal confirmation of the order, or should he have waited until a forma' signed order was delivered to him? We think that Bosler did everything consistent with good business judgment and law. On the other hand did Matthews display sound business acumen? Was it customary for him to buy wool from any Tom, Dick or Harry who deposited it on the street and then was anxious to sell it to him, without having had an order for the wool, and without the knowledge on Matthews' part whether or not the "sidewalk merchant," or vendor was a dealer in wool? Had he exercised a reasonable amount of precaution he would have discovered the fraudulent nature of the transaction.

As it is apparently plain that Bosler did not intend to sell this wool to Horn, the latter could not pass any better title that he himself took. There was no meeting of minds, because Bosler intended to sell to Matthews and not to Horn, who actually received the wool. Still he only received possession of the wool and not the property in the wool. Had he obtained both the possession and the property this bona fide purchaser would have been protected. Sinclair v. Healy, 40 Pa. 417; Levy v. Cooke, 143 Pa. 607.

Matthews' position in this case is no stronger than that of a bona fide purchaser for value from a thief. Horn obtained possession of this wool through fraudulent representations, and Barker v. Dinsmore, supra, expressly holds that the sale of goods by one who has tortiously obtained their possession, without the consent of the owner, vests no title to them in the purchaser as against the owner.

The New York citation, Paddon v. Taylor, 44 N. Y. 371 upon which the defendant's counsel bases his defense is not applicable to this case, because the Penna. Courts have not adopted the rulings of the New York courts in this respect.

On the evidence, gentlemen of the jury, your verdict should be for the plaintiff.

OPINION OF THE SUPREME COURT.

Horn was not the agent of Matthews, when he ordered the wool. He did not subsequently, represent himself to Matthews, to have bought the wool as agent of the latter. Matthews supposed himself to be buying the wool from Horn. There was then, no ratification of any agency, not previously authorized, of Horn.

Horn, however, intended that Bosler should understand that he was Matthews. His telephone voice was like that of Matthews, as he knew, and he intended by means of the resemblance, to impose on Bosler. He also explicitly pretended, in the telephone conversation, to be Matthews. He intended Bosler to think, he knew that Bosler thought, in fact Bosler did think, that he was negotiating with Matthews. Bosler was not in fact, negotiating with Matthews. The delivery of the wool was in execution of a supposed contract with Matthews. There was no real contract. The ownership of the wool did not pass to Matthews.

Nor did the ownership pass to Horn. Horn was unknown to Bosler; who intended to have, and believed that he was having dealings with him. A mistake as to the personality with whom one is dealing vitiates the contract; Clark Contracts, 200. It is, not voidable merely but void. As the wool

did not become Horn's, he could not validly sell it to Matthews. No ownership passed to Matthews, whether directly from Bosler, or circuitously through Horn. Clark, Contracts, 201, 239; Barker v. Dinsmore, 72 Pa. 427.

It follows that the goods can be recovered in this replevin, by Bosler. The fact that possession was given to Horn, and that he was thus enabled to impose on Matthews, does not destroy by estoppel the ownership of Bosler. We cannot say nor should a jury be allowed to say that that should be the consequence of dealing with a man by telephone. It would be as wise to make one who is deceived by simulated writing bear the loss, as one deceived by simulated voice. If Horn had written a letter using the name, and imitating the handwriting of Matthews and had thus deceived Bosler, Bosler would not estop himself from reclaiming the goods, because, transacting the business by mail, he had waived the evidences of authenticity that a personal interview would have furnished. Cundy v. Lindsay, 3 App. Cases 465: Neither would he estop himself by negotiating by telephone.

A can make a bailment to B of a horse, or other chattel, without exposing himself to the loss of the property if B should fraudulently sell it to C who, finding B in possession, inferred that he was the owner.

It is not yet established that a thief can pass an indefeasible title to a *bona fide* purchaser from him, because the theft was facilitated by the unsuspiciousness or negligence of the owne .

Judgment affirmed.

MUNSING'S ESTATE.

Decedent's Estate—Appointment of Minor as Executor—Right of Guardian To Act as Executor.—Appeal from the Register.

STATEMENT OF THE CASE.

A. H. Munsing died leaving a will in which he named his minor son, L. Munsing, aged eighteen years, sole executor. After various devises and bequests, the testator divides the residue of his estate among his four sons, of whom the above, L. Munsing, is one. The others are all of age and join in petitioning the register to grant letters of administration during minority to the eldest. This is objected to by the guardian of the minor executor who claims the right of administration in behalf of his ward. The register issues letters to the eldest son. Hence this appeal.

Clark for the Appellant.

Lindley for the Appellee.

No executor or administrator shall be admitted or appointed by the Orphans' Court. guardian of a minor having an interest in the estate under the care of such executor or administrator. P. & L. Col. 1505. Rhone vol. II, P. 235, Note.

The right to administer is predicated upon the ground of interest in the estate as heir, legatee or creditor. Ellmaker's Estate. 4 Watts, 34.

OPINION OF THE COURT.

DUFFY, J.:—The 23rd section of the Act of 1832 reads: "Whenever all the executors named in any last will and testament, or all the persons entitled, as kindred, to the administration of any decedent's estate, shall happen to be under the age of twenty-one years, it shall be lawful for the Register to grant administration as aforesaid to any fit person or persons subject nevertheless to be terminated at the instance of any of the said minors who shall have arrived at the full age of twenty-one years."

The report of the commissioners who prepared the code of 1832 referring to the foregoing section, contains the following: "The guardians of persons under the age of twenty-one years, *when such are the only persons entitled to letters testamentary or of administration under the preceding section*, are invested with the right to administer during the minority of their wards. 2 Rhone 294. Note B.

The "*preceding section*" referred to is section 22 of the same act, which reads in part: "That in all cases of an administration with a will annexed where there is a general residue of the estate bequeathed, the right to administer shall belong to those having the right to such residue, and the administration in such cases shall be granted by the register to such one or more of them as he shall judge will best administer the estate."

The sixth section of the Act of Mar. 29th, 1832 provides: "That no executor or administrator shall be admitted or appointed by the orphans' court guardian of a minor having an interest in the estate under the care of such executor or administrator, provided, that nothing herein contained shall be construed to extend to the case of a testamentary guardian."

The report of the commissioners who prepared the code in referring to this section said: "The provisions of this section are new to our law, but they exist in the codes of some of our sister States, and we submit that the interests of minors will be promoted by confining the office of guardian to such persons as are likely to exercise a due supervision of the accounts of the executor or the administrator." 2 Rhone 234-235.

In this case three of the four residuary legatees are of full age and otherwise competent to act, and it seems to us there is little or no doubt that the right belongs to the legatee, L. Mansing, nominated by the other two; it is not like the case where all of the residuary legatees are minors and they ask to have a substitute appointed, during their minority; in which case the guardian of the one named as executor would be invested with the right to administer. But in this case, under the will, the three elder brothers are entitled equally to a share of the residue, with the minor named as the executor, and being brothers of, and in the same class with the minor executor, they are therefore under sec. 22 of act of 1832 entitled to letters of administration, any one separately and alone, or more than one jointly, as the register in his discretion shall judge will best administer the estate.

Further, it was the intention of the commissioners who prepared the code and they so stated in their report, in reference to section six of the act of Mar. 29th, 1832, to keep the offices of guardian and administrator separate and distinct and, except in the case of a testamentary guardian, in differ-

ent persons, so that the best interests of all would be subserved, by having one keep a check, and exercise a supervision over the other, and thus serve the best intersts of both the legatees and the ward. From this we would infer that the guardian, for still another reason, would not be entitled to letters of administration, for he would not come within the 23rd section of the act of 1832," that it shall be lawful for the register to grant administration as aforesaid to any *fit person or persons*" for the guardian would not under the sixth section of the act of Mar. 29th, 1832, as quoted above, be a fit person, as he is precluded by the act from being appointed administrator while he is guardian.

The right to administer is predicated upon the ground of interest in the estate as heir, legatee, or creditor. Ellmaker's Estate, 4 Watts 34. The guardian is not qualified in any of these requirements, his interest being rather adverse.

Within the class first entitled to administration the law leaves the selection to the register. Levan's appeal, 17 W. N. C. 289, and the register having exercised his discretion within the class, a sound discretion will be presumed in the absence of evidence to the contrary.

Appeal dismissed and decree of register sustained.

OPINION OF THE SUPREME COURT.

. The right of a minor executor, to act, is postponed until his arrival at majority. in the interim, another must administer the estate. The 23d section of the act of March 15th, 1832; enacts that "it shall be lawful for the register to grant administration as aforesaid [that is administration with the will annexed] to any other *fit* person," that is any fit person, other than the minor named as executor in the will.

The 22nd section had prescribed the grant of letters of administration in cases of intestacy, according to the situation of the family, to the surviving husband, or widow, or one or more of the persons entitled to the personal estate. When all such persons are incompetent or refuse to act, the register is directed to grant the letters to one or more creditors, "or to any *fit* person at his discretion." A *fit* person is contrasted with one who is both entitled and fit. We think it was not the intention of the legislature to recognize the *right* of any body to be appointed administrator *durante minore actate.* "*Any* other fit person" may be appointed. The discretion of the register, or should that be abused, the orphans' court, must decide what fit person shall be chosen. "This sort of administration" says Williams, "has been frequently held not to be within the statute of 21 Hen. VIII c. 5. And consequently, it is discretionary in the court to grant it to such persons as it shall think fit." 1 Williams, Exec. 578. While it is added that, in the exercise of this discretion, it was the practice of the Spiritual Court to grant the administration to the guardian whom the court had a right by law to appoint, it is said that there are many instances where that court has granted administration to persons not guardians of the minor, and refused to grant it to persons nominated by them. Rogers, J., remarks, in Ellmaker's Estate, 4 W. 34,that all temporary administrations are equally out of the statutes of 31 Edw.3, and 21 Henry VIII, and "in such administrations, the ordinary is not bound to grant them to the next of kin. Nor can I believe that the legislature, in the act of 1832, intended to restrict, in this particular, the right of election

which the register had under these statutes." It is said in 1 Woerner, Administrations, 433, that in administrations *durante minoritate*, the grant "is usually, [i. e. in the various American states] 'to the guardian of the minor, but the section is entirely within the sound discretion of the court.'

That it is not the policy of Pennsylvania that the same person shall be both guardian and executor or administrator, is clear from the 6th section of the act of March 29th, 1832, which forbids the appointment of any executor or administrator as guardian. Guardians, p. 34. This policy would be subverted, if guardians might be appointed administrators, even for a short period.

The second proviso of the 22nd section of the act of March 29th, 1832 directs that "in all cases of an administration with the will annexed, where there is a general residue of the estate bequeathed, the *right* to administer shall belong to those having the right to such residue, and the administration in such case, shall be granted by the register, to such one or more of them as he shall judge will best administer the estate." This, we apprehend, as we have indicated, has no reference to a provisional temporary administration, or, at least, to one *durante minoritate*, for which the following section makes provision. But, if it did refer to administration during minority, it is clear that under it, the register must grant the temporary letters, either to the three other residuary legatees or to one or more of them, selected by him. On the nomination of two of them, he has selected the third and oldest, deeming that the one selected "will best administer the estate."

Appeal dismissed.

BOOK REVIEW

Brief Making and the Use of Law Books. By West Publishing Co. St. Paul, Minn.

Brief Making and the Use of Law Books by West Publishing Co. St. Paul, Minn.

Too much praise cannot be bestowed upon this work. It consists of a series of essays; The Brief on Appeal by Prof. Redfield. How to use Decisions and Statutes, by Prof. Wambaugh; American Law Publications by A. F. Mason, of West Publishing Company, and How to Find the Law, by Prof. Wheeler. Following these is a list of Abbreviations of the names of Reports. The third of these essays gives an interesting account of important law publications. Prof. Wambaugh's essay is of high scientific value. Prof. Wheeler expounds the analysis and classification of law and the leading legal concepts. The work is worthy of the careful perusal of every student of law and of every lawyer, and the table of Abbreviations should be kept constantly within reach.